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Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–95 OF 1998
ABDUL HAMID MOHAMED J
B 11 MARCH 1999

Administrative Law *— Exercise of administrative powers — Local authority — Whether imposition of condition for planning permission ultra vires powers of municipal council — Whether condition is reasonable and lawful — Planning Control (General) Rules 1990 r 9 — Town and Country Planning Act 1976 ss 21(3) & 22*

C

Civil Procedure *— Declaration — Application for — Application only made after more than seven years — Application made to declare condition ultra vires as there was non-compliance which would result in certificate of fitness being not issued — Whether plaintiff guilty of laches — Whether there was 'unconscionable conduct' — Whether court could grant declaration that all requirements of planning permission had been complied with —*
D *Whether prayer for mandatory injunction that defendants do forbear the imposition of condition was redundant*

Civil Procedure *— Declaration — Application for — Requirements for certiorari, prohibition and mandamus — Leave of court necessary — Time for filing — Whether plaintiff can avoid requirements by applying for declaration — Abuse of process of court —*
E *Rules of the High Court 1980 O 53 r 1A*

Civil Procedure *— Parties — Proper parties to be sued, whether — Advice by government departments to approving authority under Town and Planning Act 1976 — Aggrieved party suing approving authority — Whether government departments should be made parties to suit*

F

Civil Procedure *— Res judicata — Estoppel — Cause of action estoppel and issue estoppel — Decision of Appeal Board final — No application for writ of certiorari — Attempt to relitigate issue by way of declaration — Whether estoppel applies*

G ***Limitation*** *— Public authorities — Municipal council — Whether a public authority — Whether action was time barred*

The plaintiff, a developer, applied for planning permission for a project in Pulau Pinang ('the project'). On 4 April 1991, the second defendant (Jabatan Kerja Raya, Pulau Pinang) recommended to the first defendant (Majlis Perbandaran Pulau Pinang) that a condition, ie
H to widen the existing bridge on Jalan Relau ('the condition'), be included in the planning permission. The plaintiff appealed to the second defendant against the said imposition but was rejected. The plaintiff amended its application as required and endorsed the condition on its layout plan. The plaintiff's application was approved and the planning permission was issued to the plaintiff on
I 17 December 1991. The plaintiff commenced work in May 1993 and the planning permission was renewed four times between 8 June 1993 and 22 May 1996. On 2 July 1996, the plaintiff appealed to the Appeal Board under the Town and Country Planning Act 1976 against the

imposition of the condition. The appeal was dismissed in August 1997 on the ground that the appeal was filed out of time. On 16 February 1998, the plaintiff filed an originating summons, praying for, inter alia, orders of declaration and injunction. The issues which arose were whether: (i) the second and third defendants (Kerajaan Negeri Pulau Pinang) should be made parties to the action; (ii) leave was required before the present application was filed; (iii) the plaintiff's application was time barred; (iv) the plaintiff was guilty of laches or an 'unconscionable conduct'; (v) the plaintiff was estopped from bringing this action; (vi) the court could determine that the plaintiff had satisfied all requirements of the planning permission; and (vii) the condition was ultra vires the Town and Country Planning Act 1976, the Street, Drainage and Building Act 1974 and powers of the defendants.

Held, dismissing the originating summons with costs:

(1) The decision to approve or not to approve, with or without conditions and what conditions to impose, is the decision of the first defendant. It may and it should obtain technical advice from other relevant government departments just as it takes into account the views of its own employees. There is no legal justification for the second and third defendants to be made a party and they should be struck out as defendants (see p 394 D–G).

(2) The prayers are worded in such a way as not to mention remedies of judicial review. But clearly, prayer (b) is an attempt in a round about way, to challenge the decision of the Appeal Board. The relief sought in prayer (c) is in fact a prohibition, and even though the word 'injunction' is used in prayer (d), it is in fact a relief for mandamus. Leave is required to be obtained in all these cases within six weeks from the date of the decision of the Appeal Board. No such leave was obtained. The plaintiff was resorting to an action for declaration in order to evade the requirements of O 53 r 1A of the RHC. This was an abuse of the process of the court (see pp 394H–395H); *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749 followed.

(3) The first defendant is a local authority under the Local Government Act 1976, the Street, Drainage and Building Act 1974 and a local planning authority pursuant to the Town and Country Planning Act 1976. It is, therefore, a public authority within s 2 of the Public Authorities Protection Act 1948. The condition was imposed on 17 December 1991 and the originating summons was filed only on 16 February 1998, more than six years later. It was clearly time barred (see pp 395I–396C).

(4) The period from the date of the imposition of the condition until the date of filing the originating summons was more than seven years. Clearly, the plaintiff was guilty of laches. Further, the plaintiff must have known that, had it not amended its application, it could not obtain the planning permission. Again,

A when work was about to be completed, it must have known that without complying with the condition, it would not obtain the certificate of fitness. Then and then only, it sought to challenge the condition. This was clearly an 'unconscionable conduct' (see p 397E–G).

B (5) The decision of the Appeal Board, though on preliminary objections, was a final decision — s 36(13) of the Town and Country Planning Act 1976. The plaintiff could have applied for a writ of certiorari but did not. It tried to relitigate the same issues by asking for declarations. This was a clear case of both cause of action estoppel and issue estoppel (see p 398B–C); *Asia*
C *Commercial Finance v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed.

(6) By-Law 25(1) of the Uniform Building By-Laws 1985 provides that conditions which must first be satisfied must be satisfied before the first defendant is required to issue the certificate. The
D court is in no position to determine whether all such requirements have been complied. If the declaration is given, the effect is that the court is telling the first defendant that the plaintiff has complied with all the conditions of the planning permission and therefore, the first defendant should issue the certificate of fitness (see p 398G–H).

E (7) The legal basis for the imposition of the condition is to be found in ss 21(3) and 22 of the Town and Country Planning Act 1976 and r 9 of the Planning Control (General) Rules 1990. According to these provisions, the first defendant is perfectly right in consulting the second defendant before determining the
F plaintiff's application for planning permission. There was nothing wrong for the second defendant to require the condition to be imposed and for the first defendant to impose it (p 399A–G). Further, the requirement to widen the bridge was most reasonable due to the increase in traffic flow, following the project. Thus, the condition was reasonable and lawful (see p 401D–F);
G *Council of Civil Service Union & Ors v Minister for the Civil Service* [1985] AC 374; *Fawcett Properties Ltd v Buckingham Country Council* [1960] All ER 503; *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; *Pyx Granite Co Ltd v Ministry of Housing and Local*
H *Government & Anor* [1958] 1 All ER 625; and *Ramachandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 followed.

Obiter:

I Malaysian courts should not apply the principles of English cases without paying particular attention to local law and local circumstances. Further, no court too, should pretend that it knows more or better about town planning than town planners themselves. The courts are concerned with law, not planning (see p 401A–B).

[**Bahasa Malaysia summary**

Plaintif, seorang pemaju, memohon untuk kebenaran perancangan untuk satu projek di Pulau Pinang ('projek tersebut'). Pada 4 April 1991, defendan kedua (Jabatan Kerja Raya, Pulau Pinang) mengesyorkan kepada defendan pertama (Majlis Perbandaran Pulau Pinang) bahawa satu syarat, iaitu melebarkan jambatan sedia ada yang merintangi Jalan Relau ('syarat tersebut'), dimasukkan dalam kebenaran perancangan tersebut. Plaintif telah merayu kepada defendan kedua terhadap pengenaan tersebut tetapi telah ditolak. Plaintif telah meminda permohonannya mengikut seperti yang dikehendakki dan mengendoskan syarat tersebut dalam plan susun aturnya. Permohonan plaintif telah diluluskan dan kebenaran perancangan tersebut telah dikeluarkan kepada plaintif pada 17 Disember 1991. Plaintif memulakan kerja pada Mei 1993 dan kebenaran perancangan tersebut telah diperbaharui empat kali di antara 8 Jun 1993 dan 22 Mei 1996. Pada 2 Julai 1996, plaintif merayu kepada Lembaga Rayuan di bawah Akta Perancangan Bandar dan Desa 1976 terhadap pengenaan syarat tersebut. Rayuan telah ditolak pada Ogos 1997 atas alasan bahawa rayuan tersebut telah difailkan di luar masa. Pada 16 Februari 1998, plaintif telah memfailkan satu saman pemula memohon untuk, antara lainnya, perintah deklarasi dan injunksi. Isu-isu yang timbul adalah sama ada: (i) defendan kedua dan ketiga (Kerajaan Negeri Pulau Pinang) patut dimasukkan sebagai satu pihak kepada tindakan tersebut; (ii) kebenaran diperlukan sebelum permohonan semasa difailkan; (iii) permohonan plaintif adalah dihalang oleh had masa; (iv) plaintiff adalah bersalah atas kelewatan atau kelakukan yang tidak 'conscionable'; (v) plaintif adalah diestop daripada membawa tindakan ini; (vi) mahkamah boleh menentukan sama ada plaintif telah memenuhi semua keperluan kebenaran perancangan; dan (vii) syarat tersebut adalah ultra vires Akta Perancangan Bandar dan Desa 1976, Akta Jalan, Parit dan Bangunan 1974 dan kuasa defendan-defendan.

Diputuskan, menolak saman pemula dengan kos:

(1) Keputusan untuk meluluskan atau tidak, dengan atau tanpa syarat-syarat dan syarat apa yang dikenakan, adalah keputusan defendan pertama. Ia boleh dan patut memperolehi nasihat teknikal daripada jabatan kerajaan lain yang relevan seperti mana ia mengambil kira pandangan-pandangan kakitangannya sendiri. Tidak terdapat justifikasi perundangan untuk defendan kedua dan ketiga dimasukkan sebagai satu pihak dan mereka harus dibatalkan sebagai defendan-defendan (lihat ms 394D–G).

(2) Tuntutan-tuntutan tersebut telah disusun sedemikian supaya tidak menyatakan remedi-remedi kajian semula kehakiman. Akan tetapi, dengan jelasnya, tuntutan (b) adalah satu percubaan secara berbelit-belit, untuk mencabar keputusan Lembaga Rayuan. Relif yang dipohon dalam tuntutan (c) adalah secara fakta satu larangan, dan walaupun perkataan 'injunksi' digunakan dalam tuntutan (d), ia adalah secara fakta satu relif untuk mandamus.

Kebenaran adalah perlu diperolehi dalam semua kes-kes ini dalam masa enam minggu dari tarikh keputusan Lembaga Rayuan. Tiada kebenaran sedemikian yang diperolehi. Plaintif cuba menggunakan satu tindakan untuk deklarasi supaya dapat mengelak daripada keperluan A 53 k 1A KMT. Ini merupakan satu salahguna proses mahkamah (lihat ms 394H–395H); *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749 diikut).

(3) Defendan pertama merupakan satu pihak berkuasa tempatan di bawah Akta Kerajaan Tempatan 1976, Akta Jalan, Parit dan Bangunan 1974 dan satu pihak berkuasa perancangan tempatan mengikut Akta Perancangan Bandar dan Desa 1976. Oleh itu, ia adalah satu pihak berkuasa awam di bawah s 2 Akta Perlindungan Pihak Berkuasa Awam 1948. Syarat tersebut telah dikenakan pada 17 Disember 1991 dan saman pemula difailkan hanya pada 16 Februari 1998, lebih daripada enam tahun kemudiannya. Ia dengan jelas adalah dihalang oleh had masa (lihat ms 395I-396C).

(4) Tempoh masa dari tarkh pengenaan syarat tersebut sehingga tarikh pemfailan saman pemula adalah lebih daripada tujuh tahun. Dengan jelas, plaintif adalah bersalah atas alasan kelewatan. Selanjutnya, plaintif semestinya mengetahui bahawa, jika ia tidak meminda permohonannya, ia tidak akan dapat memperolehi kebenaran perancangan tersebut. Sekali lagi, bila kerja hampir diselesaikan, ia semestinya mengetahui bahawa tanpa pematuhan kepada syarat tersebut, ia tidak akan memperolehi sijil kelayakan. Hanya selepas itu sahaja, ia cuba untuk mencabar syarat tersebut. Ini dengan jelas merupakan satu kelakukan yang tidak 'conscionable' (lihat ms 397E–G) *Asia Commercial Finance v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed.

(5) Keputusan Lembaga Rayuan, walaupun atas bantahan permulaan, adalah satu keputusan muktamad — s 36(13) Akta Perancangan Bandar dan Desa 1976. Plaintif boleh memohon untuk satu writ certiorari tetapi telah tidak berbuat sedemikian. Ia sekarang cuba untuk melitigasikan semula isu-isu yang sama dengan memohon untuk deklarasi-deklarasi. Ini merupakan satu kes yang jelas untuk kedua-dua estopel kausa tindakan dan estopel isu (lihat ms 398B–C).

(6) Undang-undang kecil 25(1) Undang-Undang Kecil Keseragaman Bangunan 1985 memperuntukkan bahawa syarat-syarat yang mesti dipenuhi hendaklah dipuaskan dahulu sebelum defendan pertama diperlukan untuk mengeluarkan sijil tersebut. Mahkamah tidak berada dalam kedudukan untuk menentukan sama ada semua keperluan-keperluan tersebut telah diikuti. Jika deklarasi tersebut diberikan, kesannya adalah, mahkamah memberitahu defendan pertama bahawa plaintif telah memenuhi semua syarat-syarat kebenaran perancangan tersebut dan oleh itu, defendan pertama harus mengeluarkan sijil kelayakan tersebut (lihat ms 398E–H).

(7) Dasar perundangan untuk pengenaan syarat tersebut boleh ditemui dalam ss 21(3) dan 22 Akta Perancangan Badan dan Desa 1976 dan k 9 Kaedah-Kaedah Kawalan Perancangan (Am) 1990. Daripada peruntukan-peruntukan ini, defendan pertama adalah betul dengan sepenuhnya dalam berunding dengan defendan kedua sebelum menentukan permohonan plaintif untuk kebenaran perancangan. Tidak terdapat apa-apa yang salah untuk defendan kedua memerlukan syarat tersebut dikenakan dan untuk defendan pertama mengenakannya (lihat ms 399A–G). Selanjutnya, keperluan untuk melebarkan jambatan tersebut adalah amat munasabah disebabkan oleh peningkatan dalam aliran trafik berikutan dengan projek tersebut. Oleh itu, syarat tersebut adalah munasabah dan sah di sisi undang-undang (lihat ms 401D–F); *Council of Civil Service Union & Ors v Minister for the Civil Service* [1985] AC 374; *Fawcett Properties Ltd v Buckingham Country Council* [1960] All ER 503; *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94; *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Anor* [1958] 1 All ER 625; dan *Ramachandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 diikut.

Obiter:

Mahkamah-mahkamah di Malaysia tidak patut menerima pakai prinsip-prinsip kes-kes Inggeris tanpa memberi perhatian yang teliti kepada undang-undang dan keadaan tempatan. Selanjutnya, tiada mahkamah juga patut berpura-pura mengetahui lebih banyak atau lebih baik tentang perancangan bandar daripada perancang-perancang bandar mereka sendiri. Mahkamah-mahkamah adalah berkenaan dengan undang-undang, bukan dengan perancangan (lihat ms 401A–B).]

Notes

For cases on exercise of administrative powers by local authority, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 48–54.

For cases on application for declaration, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1500–1512.

For cases on proper parties to be sued, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3369–3372.

For cases on estoppel, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3996–3998.

For cases on limitation of actions in cases of public authorities, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1900–1902.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)

Asia Commecial Finance v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (folld)
Baltim Timber Sdn Bhd v Director of Forests & Ors [1996] 4 MLJ 103 (refd)
Council of Civil Service Union & Ors v Minister for the Civil Service [1985] AC 374 (folld)
Fawcett Properties Ltd v Buckingham Country Council [1960] All ER 503 (folld)
Katherine Lim KH, Sr v Ketua Pengarah Perkhidmatan Perubatan Malaysia Kementerian Kesihatan & Ors [1997] 2 MLJ 538 (refd)
Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd [1996] 3 MLJ 94 (folld)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (folld)
Pyx Granite Co Ltd v Ministry of Housing and Local Government & Anor [1958] 1 All ER 625 (folld)
Ramachandran v The Industrial Court of Malaysia [1997] 1 MLJ 145 (folld)
Tengku Ali ibni Almarhum Sultan Sulaiman v Kerajaan Negeri Terengganu Darul Iman [1996] 4 MLJ 374 (refd)
Yahya bin Kassim v Government of Malaysia & Anor [1997] 3 MLJ 749 (folld)

Legislation referred to

Civil Law Act 1956 s 3
Government Proceedings Act 1956 s 5
Local Government Act 1976 s 13
Planning Control (General) Rules 1990 r 9
Public Authorities Protection Act 1948 s 2
Rules of the High Court 1980 O 7 r 2, O 53 r 1A
Specific Relief Act 1950 s 44
Town and Country Planning Act 1976 ss 21(3), 22, 23, 36(13)
Uniform Building By-Laws 1985 by-law 25(1)

Lakhbir Singh (*Jagjit Kaur* with him) (*Lakhbir Singh Chahl & Co*) for the plaintiff.

Karen Lim (*Presgrave & Matthews*) for the first defendant.

Mohd Ruzima bin Ghazali (Pejabat Penasihat Undang-Undang Negeri Pulau Pinang) for the second and third defendants.

Abdul Hamid Mohamad J: Even though in these proceedings parties have used the terms 'applicant' and 'respondents', in view of the provisions of O 7 r 2 of the Rules of the High Court 1980 ('the RHC'), I shall use the term 'plaintiff' and 'defendants' to denote the parties.

The plaintiff is a developer. On 13 October 1990, the plaintiff's architects, M/s Perunding Alam Bina, submitted an application for planning permission for the erection of five blocks of 19-storey (720 units) medium cost flats on Parcel A1 and 24 units of two-storey shophouses and one block of 16-storey (344 units) low cost flats on Parcel A2 on part of Lot 2366 Mk 12, South West District, Pulau Pinang.

As usual, the proposed plans were referred to the various technical departments including the Jabatan Kerja Raya, Pulau Pinang ('the JKR'), the second defendant, for comments.

On 4 April 1991, the second defendant ('the JKR') reverted to the first defendant with its comments, inter alia, as follows:

> Condition 12
>
> Jambatan sedia ada yang merintangi Jalan Relau di bahagian utara lot ini hendaklah dilebarkan mengikut taraf JKR. Ini hendaklah diwarnakan dan disebutkan di atas plan.

On 10 June 1991, the plaintiff 'appealed' to the second defendant through its architects in respect of the conditions including condition 12 above.

By a letter dated 13 August 1991 to the plaintiff's architects, the second defendant rejected the 'appeal'. A copy of the letter was sent to the plaintiff.

The plaintiff then amended the application as required and the same condition was endorsed on the layout plan.

The first defendant approved and on 17 December 1991 issued the planning permission to the plaintiff subject to various conditions, including condition (viii) as follows:

> Mematuhi kehendak-kehendak Pihak Berkuasa Air, Tenaga Nasional Bhd, *Jabatan Kerja Raya*, Jabatan Pengairan dan Saliran, Jabatan Bomba, Syarikat Telekom Malaysia dan MPPP (first respondent) sebelum pelan bangunan diluluskan. (Emphasis added.)

Between 8 June 1993 to 22 May 1996, the planning permission was renewed four times.

According to the plaintiff (encl 1, para 23), the plaintiff commenced work in May 1993.

On 2 July 1996, the plaintiff appealed to the Appeal Board pursuant to s 23 of the Town and Country Planning Act 1976 on the following grounds:

> We, the registered proprietors/developers of the said lot are aggrieved over the condition imposed by the local planning authority, namely the existing bridge on Jalan Relau be widened to the specifications of JKR. The grounds of our grievance are as follows:
>
> (i) that the existing bridge is on state land and is outside the project site;
>
> (ii) that the proposed widening of the existing bridge is for the convenience of the traffic on Jalan Relau and for the benefit of other development project in the vicinity;
>
> (iii) that the costs and expenses of the proposed widening of the existing bridge has to be borne solely by the developers.

The appeal was heard by the Appeal Board on 9 August 1997. At the hearing, the first defendant raised two preliminary objections, namely:

(i) The appeal was filed out of time;

(ii) The Appeal Board was precluded from entertaining the appeal as the notice of appeal was filed out of time and there was no application filed by the plaintiff for an extension of time to file the notice of appeal out of time.

A The Appeal Board allowed the first defendant's objections and dismissed the appeal.

On 16 February 1998, after about six months, the plaintiff filed this originating summons, praying for the following orders:

(a) a declaration that the plaintiff has satisfied all the requirements under
B the Town and Country Planning Act 1976;

(b) for a declaration or declarations that the decision of the Municipal Council Penang in Planning Approval No JPB/KM/0578/A[JPB/PM854(LB)] requiring the plaintiff to widen an existing bridge located along Jalan Relau is outside the powers of the defendants and
C that the requirement and or condition is ultra vires the said Act;

(c) a mandatory injunction that the defendants do forebear the imposition of the said condition as the said condition is outside their jurisdiction and illegal under the law;

(d) that the defendants be restrained by an injunction from imposing such a condition and to remove the said condition as the condition and the
D act of the defendants in imposing the said condition is ultra vires the powers of the defendants, oppressive and a nullity; and further

(e) for the award of damages and other incidental relief.

In his affidavit in support of the originating summons, the managing
E director of the plaintiff, inter alia, said that the first phase of the project was almost complete and that the plaintiff would soon be applying for a certificate of fitness. He said that the certificate of fitness would not be issued if all the conditions imposed by the first defendant were not fulfilled by the plaintiff. That would cause financial loss to the plaintiff.

In other words, the plaintiff had, by the inclusion of the said condition
F in its application for planning permission, agreed with the imposition of the said condition. After permission was given and renewed, the plaintiff commenced work. About five years later, when the first phase was nearing completion and the plaintiff would soon be applying for the certificate of fitness which the plaintiff must have known that without complying with the
G condition the certificate would not be issued, the plaintiff appealed to the Appeal Board. The appeal was dismissed. The plaintiff did not apply for leave within the required six weeks, or at any time, to apply to court for judicial review. Instead, some five months later, the plaintiff filed this originating summons.

H *Wrong parties*

Learned assistant to the State Legal Advisor, representing the second and third defendants argued that the second and third defendants should not have been made parties in the proceedings. Regarding the second defendant ('the JKR') he argued that it was no more than a government department
I with no legal entity of its own. Its function, in this matter, was only to advise the first defendant on technical aspects when its comments were requested by the first defendant when the latter received an application for planning permission from the plaintiff. It had no power to impose any condition but only to recommend. The power to approve an application lay with the first defendant, with or without the condition recommended by the second

defendant. Therefore, the second defendant should not have been made a party at all.

Regarding the third defendant (Kerajaan Negeri Pulau Pinang), he argued that the liability of the third defendant would only arise if the matter fell under the provision of s 5 of the Government Proceedings Act 1956:

> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purpose of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

Since the second defendant was wrongly cited, it follows that the third defendant was also wrongly cited as a party.

I have considered these arguments and I agree with him. The first defendant is the approving authority — s 22 of the Town and Country Planning Act 1976. It may and it should obtain technical advice from other relevant government departments just as it takes into account the views of its own employees — see r 9 of the Planning Control (General) Rules 1990 reproduced below. The decision to approve or not to approve, with or without conditions and what conditions to impose, is the decision of the first defendant. The first defendant is a body corporate which may sue and be sued — s 13 of the Local Government Act 1976. There is no legal justification for the second or the third defendant to be made a party. The officer's time and the taxpayers' money would be better spent than to defend this action. Of course, it is common practice to add as a party a government officer eg Registrar of Titles where the order prayed for, eg for the removal of caveat, will require the officer to do something which is within his power to do. It is not the case here. Here, if such an order were to be made, it would be against the first defendant only.

On this ground alone, the second and third defendants should be struck out as defendants and the action against them dismissed and with costs.

I will discuss other grounds which are applicable to all the defendants.

No leave

The approval of the application for planning permission with the impugned condition was given in December 1991. The plaintiff appealed to the Appeal Board in July 1996. The appeal was dismissed in August 1997. This originating summons was filed in February 1998, some six months later. I have reproduced the prayers. The prayers are worded in such a way as not to mention remedies of judicial review. But clearly, prayer (b) is an attempt in a round about way, to challenge the decision of the Appeal Board. The appeal to the Appeal Board was dismissed because the plaintiff appealed out of time, about $4^1/_2$ years after the imposition of the condition when it should have been filed within one month thereof. The plaintiff must have realized that it could not succeed if it were to apply for judicial review to quash that decision by applying for the issue of a writ of certiorari. So, the plaintiff

A applied for a declaration which, if granted, would have the same effect. Furthermore, to apply for the issue of the writ of certiorari, leave would have to be obtained within six weeks from the date of the decision. The plaintiff was again out of time. To avoid these two hurdles, the plaintiff applied for an order of declaration.

B Relief sought in prayer (c) is in fact a prohibition — to prohibit the defendants from imposing the said condition.

Even though the word 'injunction' is used in prayer (d), it is in fact a relief for mandamus, ie to expunge the said condition.

In all these cases, leave is required to be obtained within six weeks from the date of the decision of the Appeal Board. No such leave was obtained.

C

In *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749 (CA), the Public Service Commission ('PSC') decided that the appellant be punished by a reduction in rank for committing an act of misconduct. The decision was communicated to him on 26 September 1987. His appeal to the PSC was rejected on 30 March 1988. On

D 28 February 1990, about two years later, he filed a writ seeking a declaration that his reduction in rank was void and for consequential relief in the form of damages. The trial judge dismissed the action. He appealed to the Court of Appeal. Dismissing the appeal, the Court of Appeal held:

> Order 53 r 1A of the Rules of the High Court 1980 provides that applications
> E for an order of certiorari to quash a decision must be made within six weeks of the decision in question. Leave is required before the substantive application can be filed. The failure to apply within the time limit is usually fatal. In this case, the appellant only filed a writ for a declaration that his reduction in rank was void 29 months after the decision was communicated to him.
>
> F Further, it was an abuse of process on the part of the appellant to resort to an action for declaration in order to evade the clear requirements of O 53 r 1A. The appellant's appeal was, therefore, devoid of any merit and was dismissed accordingly (see pp 7511 and 752A–C, H).

See also *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287.

G

Similarly, in the present case, it is very clear that the plaintiff is resorting to an action for declaration in order to evade the clear requirements of O 53 r 1A of the RHC. This is clearly an abuse of the process of the court.

If prayer (d) is indeed for an injunction, it is also caught by the provision of s 44 of the Specific Relief Act 1950 which prohibits a judge making an

H order requiring any specific act to be done or forborne by a public officer unless the applicant has no other specific and adequate legal remedy. Here, there is a right of appeal provided by statute, which the plaintiff had resorted to unsuccessfully.

I *Limitation*

The first defendant is a local authority under the Local Government Act 1976, the Street, Drainage and Building Act 1974 and a local planning authority pursuant to the Town and Country Planning Act 1976. It is, therefore, a public authority within the meaning of s 2 of the Public

Authorities Protection Act 1948. Any suit, action, prosecution or other proceeding against it must commence within 36 months next after the act, neglect or default complained of.

In this case, the impugned condition was imposed on 17 December 1991. This originating summons was filed only on 16 February 1998, more than six years later. It is clearly time barred — see *Baltim Timber Sdn Bhd v Director of Forests & Ors* [1996] 4 MLJ 103; *Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia Kementerian Kesihatan & Ors* [1997] 2 MLJ 538 and *Tengku Ali ibni Almarhum Sultan Sulaiman v Kerajaan Negeri Terengganu Darul Iman* [1996] 4 MLJ 374.

On this ground too, the originating summons should be dismissed.

Laches

The case of *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* [1996] 3 MLJ 94 (CA) is somewhat similar to this case. Briefly, in that case, the respondent (in the appeal before the Court of Appeal) wanted to construct an 11-storey commercial building on its land. It submitted the earthworks and layout plans to the appellant for approval. The layout plan was approved by the appellant with the condition that the respondent had to construct a monsoon drain on the adjoining state land. The earthworks plan, which was approved subsequently, came with the condition that the respondent construct a perimeter drain on the respondent's land. The respondent did not appeal against the imposition of the conditions. The respondent then commenced construction. However, the respondent later submitted an amended layout plan to the appellant because the respondent wanted to construct a five-storey building instead of the original 11-storey building. The perimeter drain was not drawn into the amended layout plan. The appellant approved the amendment. After the building was completed, the respondent applied to the appellant for a certificate of occupation. The appellant refused to issue the certificate, principally on the ground that the respondent had failed to comply with the conditions, ie the respondent had only constructed about 80% of the monsoon drain, and did not construct the perimeter drain at all. The respondent took out an originating summons claiming declarations to the effect that the appellant's refusal to issue the certificate of fitness for the building was unlawful. The respondent contended that it was unreasonable for the appellant to impose the conditions. The learned trial judge granted declarations that the appellant was not entitled in law nor justified in the exercise of its discretion to require the respondent as conditions for the issuance of an occupation certificate: (i) to construct a perimeter drain on the land; and (ii) to complete the construction of the monsoon drain on state land with the presence of illegal structures on the state land.

The Court of Appeal allowed the appellant's appeal on a number of grounds. For the present purpose, I shall only quote a passage from the judgment at p 106H:

> In the case of the monsoon drain, there is abundant evidence that the respondent knew that it had to be constructed on state land. It knew, or must be taken to know, of the presence of squatters. Yet it did not complain about the condition at the time it was imposed. It did not appeal against the

A imposition of the condition. If its appeal had been unsuccessful, it may have moved for certiorari to quash the condition. But, as we have already observed, it did none of these things. And there is reason for its earlier reticence. Locating the monsoon drain on state land meant that the respondent had the use of all its land. Had the monsoon drain been relocated on the respondent's land, it would have meant having to give up a portion of its land. That is
B probably why it initially accepted the condition on the layout plan.

At para H of p 107 the learned judge said:

> ... No doubt that the High Court has jurisdiction to grant such relief. But it is equally settled that the remedy is discretionary in nature. A plaintiff who establishes his right may nevertheless be refused declaratory relief in certain
C circumstances, eg where he is guilty of laches or other unconscionable conduct. See *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380 at p 384.

In the present case too, when its 'appeal' to the second defendant (no such appeal is provided by law) failed, the plaintiff amended its application as
D required and the plan, as amended, was approved by the first defendant. That was on 17 December 1991. The planning permission was extended four times. Work commenced in May 1993. Only when the construction was nearing completion, in July 1996, that it appealed against the imposition of the condition. When that appeal failed, it did not come to this court for an order of certiorari, but, only in February 1998, filed this
E originating summons asking for declarations. The period from the date of the imposition of the condition until the date of filing this originating summons is more than seven years. Clearly, the plaintiff is guilty of laches.

Indeed, as in *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd*, the reasons for its earlier reticence is not difficult to understand. It must have known that, had it not amended the application, it could not obtain the
F planning permission it required to commence work. However, when work was about to be completed, and again, it must have known that without complying with the condition, it would not obtain the certificate of fitness. Then and then only, it sought to challenge the condition. This is clearly an 'unconscionable conduct.'

G On this ground too, the application would be dismissed.

Res judicata

As regards the law on this point, I will only quote the headnote in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ
H 189 (SC).

> Held, allowing the appeal:
>
> (1) When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between
I such parties. An estoppel per rem judicatum has been created as a result.
>
> (2) There are two kinds of estoppel per rem judicatum, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel

> prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

As we have seen in this case, the decision of the Appeal Board, though on preliminary objections, is a final decision — see s 36(13) of the Town and Country Planning Act 1976. There is no further appeal provided by law. Of course, the plaintiff could have applied for writ of certiorari but did not. Now, it tries to relitigate the same issues by asking for declarations. To me, this is a clear case of both cause of action estoppel and issue estoppel.

I think the situation is analogous to a judgment in default. No doubt, the merit has not been gone into. Of course, the party against whom the judgment is obtained may apply to set it aside. But, if the judgment is not set aside, the parties are prevented from commencing a fresh proceeding on the same subject matter by that judgment.

On this ground too the originating summons should be dismissed.

Merits

I shall now deal more specifically with the various prayers.

Prayer (a)

In prayer (a), the plaintiff prays for a declaration that the plaintiff has complied and fulfil all the conditions and requirements of the relevant local authorities and the law in respect of the said planning permission.

It is clear that if the declaration is given, the effect is that the court is telling the first defendant that the plaintiff has complied with all the conditions of the planning permission and, therefore, the first defendant should issue the certificate of fitness. That is what the plaintiff wants, and that is what the plaintiff is asking the court to do.

By-law 25(1) of the Uniform Building By-Laws 1985 provides that conditions which must first be satisfied, and it goes without saying, to the satisfaction of the first defendant, must be satisfied before the first defendant is required to issue the certificate. This court is in no position to determine whether all such requirements have been complied. Indeed, the plaintiff has only singled out one condition and says that condition is bad in law and, therefore, it does not have to comply with it. It then asks this court to assume that it has complied with all other conditions required by law or imposed by the first defendant and asks this court to declare so, thus forcing the first defendant to issue the certificate. This is clearly an abuse of the process of the court.

Prayer (b)

In prayer (b), the plaintiff asks for a declaration that the impugned condition is ultra vires the Town and Country Planning Act 1976, the Street, Drainage and Building Act 1974 and outside the powers of defendants.

I have dealt at length with the reasons why this application should not be allowed under various headings. I shall now deal only with the merits of the application, ie whether the condition is ultra vires the said Acts and powers of the defendants. The legal basis for the imposition of the condition is to be found in the relevant Act. Section 21(3) of the Town and Country Planning Act 1976 which provides:

> Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters, that is to say —
>
> (a) the level of the site of the building;
>
> (b) the line of frontage with neighbouring buildings;
>
> (c) the elevations of the building;
>
> (d) the class, design, and appearance of the building;
>
> (e) the setting back of the building to a building line;
>
> (f) access to the land on which the building is to be erected; and
>
> (g) any other matter that the local planning authority considers necessary for purposes of planning.

Section 22 of the same Act provides:

> (1) ...
>
> (2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning permission.
>
> (3) After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

Rule 9 of the Planning Control (General) Rules 1990 provides:

> Before determining an application for planning permission, the local planning authority may consult any authority department, body or person.

It is very clear from these provisions that the first defendant is perfectly right in consulting the second defendant before determining the plaintiff's application for planning permission. There is nothing wrong for the second defendant to require the condition to be imposed and for the first defendant to impose it. The question is whether the condition itself is of the kind that can validly be imposed.

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (FC) concerned the power of the Director of Lands and Mines to substitute a 99 years lease for a title in perpetuity in an application for sub-division of the land and for conversion as to the user of the land. In his judgment, Suffian LP referred to English authorities of *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Anor* [1958] 1 All ER 625 and *Fawcett Properties Ltd v Buckingham Country Council* [1960] 3 All ER 503 and said:

> English cases are of course decisions on the peculiar words used in the Town and Country Planning Act, whereas here we are concerned with the peculiar words used in the National Land Code, but nevertheless I am of the opinion

that English cases afford principles that may be followed here. What are these principles? They are: A

(1) The approving authority does not have an uncontrolled discretion to impose whatever conditions it likes.

(2) The condition, to be valid, must fairly and reasonably relate to the permitted development.

(3) The approving authority must act reasonably and planning conditions must be reasonable. B

(4) The approving authority is not at liberty to use its power for an ulterior object, however desirable that object may seem to it in the public interest.

Applying the principles, the learned Lord President held that the Director of Lands and Mines had no power to do what he did as the condition imposed did not relate to the permitted development, it was unreasonable and was used for an ulterior object. C

More recently, the Court of Appeal in *Majlis Perbandaran Seberang Perai v Tropiland Sdn Bhd* upheld the condition that the respondent (in that case) construct a monsoon drain on the adjoining state land imposed by the appellant (in that case) when approving the layout plan. As the condition was not fulfilled by the respondent, the court held that it could not be said that the appellant was acting unreasonably in withholding the certificate of fitness. D

Gopal Sri Ram JCA in his judgment said, at p 105: E

> ... very recently, it was thought that when the exercise of discretion by a public decision-maker is challenged on the ground of illegality or 'Wednesbury unreasonableness', the court merely examines the decision-making process and not the correctness of the decision itself on merits. The fallacy of this approach has now been exposed by the majority decision of the Federal Court in *Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145. F

At p 106, the learned judge said:

> It follows that when the exercise of the discretion by a public body, such as the appellant, is challenged, a court is entitled to — indeed it must — examine the facts and determine whether the decision arrived at is reasonable in the sense described by Edgar Joseph Jr FCJ in the foregoing passage [which was quoted by the learned judge — added]. If it is, then, it is safe from attack. If it is not, then, the appropriate remedy may be given. G

It should be noted that in the judgment of Edgar Joseph Jr FCJ in *Ramachandran v The Industrial Court of Malaysia & Anor* quoted by the learned judge, Edgar Joseph Jr FCJ quoted Lord Diplock in *Council of Civil Service Union & Ors v Minister for the Civil Service* [1985] AC 374, when discussing the ground of 'irrationality' which, to me, is just another word for 'unreasonableness': H

> ... a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I

These are pronouncements of courts higher than this court and are binding on this court. In any case, these are sound principles which this court has no hesitation to adopt. However, if I may add, in applying these principles

we must always bear in mind the local circumstances in Malaysia. After all, when the Malaysian Parliament made these laws, it took into account local circumstances and made these laws to regulate planning in this country. Therefore, Malaysian courts should not apply the principles without paying particular attention to local laws and local circumstances. Further, no court too, should pretend that it knows more or better about town planning than town planners themselves. Courts are concerned with law, not planning.

Even s 3 of Civil Law Act 1956, passed one year before 'Merdeka', contains a proviso that the common law of England should only be applied 'so far only as the circumstances permit and subject to such modifications as local circumstances render necessary'.

I shall now revert to the facts of this case.

The proposed development involves the construction of 1,628 units. The Director of the Department of Town Planning in his affidavit (encl 8) said that the development, due to its high density, will cause severe strain on the existing infrastructure in the area especially the existing bridge, the traffic flow over which is already at its optimum level. This was not contradicted. Whether or not contradicted, it is common knowledge that every household on Penang Island has at least one vehicle, usually more. Therefore, the requirement is most reasonable. Indeed, it would be bad planning if no account is taken of the increase in traffic flow.

It is regrettable, speaking from the cases that come to this court, that developers want maximum density but minimum, or nil, contribution towards the upgrading of infrastructure. They, hopefully only some of them, seem only to think of maximizing their profits and are not at all concerned about the adverse effects caused by them, for which the local government is usually blamed.

It is my judgment that the impugned condition is reasonable and lawful.

Prayer (c)

All I need say is that, this prayer is completely unnecessary and redundant in view of prayer (b). Anyway, the condition had been imposed about seven years prior to the commencement of this proceeding. There is no question of prohibiting the first defendant from imposing it any more.

By way of conclusion, I am of the opinion that either procedurally or on merits, this originating summons should be dismissed and it was dismissed with costs.

Originating summons dismissed with costs.

Reported by Tan Kah Bee